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SERVICE DATE – AUGUST 2, 2005

This decision will be included in the bound volumes of printed reports at a later date.

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 38302S

UNITED STATES DEPARTMENT OF ENERGY AND UNITED
STATES DEPARTMENT OF DEFENSE

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

Docket No. 38376S

UNITED STATES DEPARTMENT OF ENERGY AND UNITED
STATES DEPARTMENT OF DEFENSE

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL.

Decided: July 27, 2005

The United States Department of Energy (DOE) and the United States Department of Defense (herein the Government), joined by Union Pacific Railroad Company (UP), have filed a motion seeking approval under 49 U.S.C. 10704 of a settlement agreement (Agreement) they negotiated to resolve rate reasonableness complaints filed by the Government against UP. The Agreement eliminates UP as a defendant in these longstanding complaints by the Government challenging the rates charged by the railroads for the transportation of naval spent nuclear fuel (SNF). Separately, the Government seeks approval of “ground rules” to govern its continuing challenge of through rates that include UP. The Government also requests that we continue these proceedings in abeyance pending settlement negotiations with remaining railroad parties. We are granting the joint motion to approve the Agreement, declining in part to rule on, and granting in part, the Government’s separate request for ground rules, and otherwise granting the Government’s request to continue holding these proceedings in abeyance.

BACKGROUND

In these complaints, filed in March 1981 under section 229 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, the Government sought reparations and a rate prescription against 21 major railroads, relating to the nationwide movement of SNF and radioactive components and the empty containers (casks) and loading/unloading

equipment used for their movement. In 1986, the Board's predecessor, the Interstate Commerce Commission (ICC), found that the railroad parties were engaging in an unreasonable practice by imposing what the ICC found to be substantial and unwarranted cost additives — above and beyond the regular train service rates — in an effort to avoid transporting SNF. The ICC canceled the existing rates and cost additives, prescribed new rates using the revenue-to-variable cost (R/VC) methodology it had adopted for similar shipments moving in the East,¹ and awarded reparations for the amount of unwarranted cost additives. See Commonwealth Edison v. Aberdeen & Rockfish R., Et Al., 2 I.C.C.2d 642 (1986). The United States Court of Appeals for the D.C. Circuit set aside and remanded the ICC's decision. Union Pacific R. Co. v. ICC, 867 F.2d 646 (D.C. Cir. 1989) (Union Pacific). The court discussed the distinction between “unreasonable practice” and “unreasonable rate” complaints (id. at 648-49), and concluded that in this case, “the so-called ‘practice’ is manifested *exclusively* in the level of rates that customers are charged” (id. at 649, emphasis in original). Therefore, the Court concluded that the ICC should have handled this as a rate reasonableness case, not an unreasonable practice case, and therefore should have either applied the constrained market pricing (CMP) methodology² or explained why its use would be inappropriate (id. at 653).

On remand, the Government argued that the SNF shipments were recyclables that were subject to a rate cap on recyclables set out in 49 U.S.C. 10731(e). In 1994, the ICC ruled that the movement of naval SNF that was to be reprocessed and the empty return movement of cask cars used to transport naval SNF that was to be reprocessed qualified as recyclables. The ICC directed the parties to file R/VC evidence to resolve the remaining reparations and rate prescription issues. See DOE & DOD v. B & O Railroad Co., Et Al., 10 I.C.C.2d 112 (1994).

The railroad parties sought judicial review of the ICC's decision. While their appeals were pending, Congress enacted the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which repealed 49 U.S.C. 10731 in its entirety and directed that all

¹ Trainload Rates on Radioactive Materials, East. R., 362 I.C.C. 756 (1980), reopened, 364 I.C.C. 981 (1981) (maximum R/VC ratios were prescribed on a commodity-by-commodity basis at various minimum weights as local and proportional rate factors. The prescription was applicable within the East but primarily was to be used for through movements destined beyond the lines of the carriers covered by the prescription). The ICC's 1980 decision, 362 I.C.C. 756, was affirmed in Consolidated Rail Corp. v. ICC, 646 F.2d 642 (D.C. Cir. 1981), cert. denied, 454 U.S. 1047 (1981).

² See Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (adopted and applied CMP principles to coal movements) aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987) and Rate Guidelines—Non-Coal Proceedings, Ex Parte No. 347 (Sub-No. 2) (ICC served Apr. 8, 1987) (endorsed the application of CMP principles to non-coal movements).

proceedings pending under the repealed section be terminated. In January 1996 the railroad parties petitioned to dismiss the complaints.

In 1997, the railroad parties invited the Government to explore the possibility of a settlement. Discussions commenced with the parties initially hoping to reach a nationwide settlement covering all of the railroads that might carry SNF and related commodities. The Government subsequently chose to negotiate with UP, the destination carrier for most of the SNF movements that are to be covered by the Agreement, after the parties concluded that there were potential antitrust problems in negotiating with the railroad parties as a group. The proceedings have been held in abeyance for much of the time since then to permit negotiations.

On September 15, 2004, the Government and UP filed the instant motion. Notice of the Agreement was served and published at 69 FR 64629 on November 5, 2004. CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS) filed comments, and the Government and UP filed replies.

DISCUSSION AND CONCLUSIONS

The Agreement.

The scope of the Agreement extends beyond the commodities encompassed in the original complaints. It applies to the nationwide movement over UP of SNF and “irradiated parts or constituents” in casks; other radioactive wastes requiring protective shielding or labeling, marking, or placarding; empty casks; and buffer and escort cars (collectively herein, the covered movements). These movements include SNF shipments that are projected to move under DOE auspices from the nation’s electric utilities to Yucca Mountain, NV, the site designated as the nation’s permanent nuclear waste repository. See Pub. L. No. 107-200, 116 Stat. 735. They also embrace shipments of foreign research reactor fuel that are expected to move to storage sites. Movants ask that the Agreement be approved under 49 U.S.C. 10704. They anticipate that it will serve as a model for settlements the Government will seek to negotiate with remaining railroad parties.

The Agreement recognizes that the transportation of the covered movements over UP constitutes common carrier service; adopts guidelines for their safe handling and security; and obligates UP to provide, on an as needed basis, “extra services.” It also adopts rate methodologies and procedures to: (1) govern all current and future covered movements anywhere on UP’s system; (2) compensate UP for “extra services” and Government requested dedicated train service; and (3) calculate equitable compensation to reimburse UP for emergency related costs. Additionally, the Agreement adopts alternative dispute resolution procedures with final recourse to the Board and mechanisms to renegotiate portions of the Agreement if specific circumstances change or if changed circumstances make further adherence to the terms of the Agreement “grossly inequitable” to either party.

The Agreement will be implemented by UP tendering rate quotations to the Government under 49 U.S.C. 10721. Movants state that all of the rates under the rate methodology will be common carrier rates fully subject to the Board's rate reasonableness jurisdiction, see Union Pacific, 867 F.2d at 652; and that contract rates, which they claim are unsuitable for resolving these disputes, are not involved.

Movants ask that we prescribe the Agreement's rate methodology and update provisions. The Agreement's rate methodology adopts various maximum R/VC markups of UP's most current system average variable unit costs computed under the Board's Uniform Rail Costing System. These markups may not exceed 180, 250, or 351% of variable costs, depending on commodity type.

The Agreement releases UP (including its predecessors and all subsidiaries) from any liability to the Government for reparations in these proceedings. Additionally, the Agreement preserves the Government's claims, and announces its intent to enforce these claims, against remaining railroad parties. In this regard, the Agreement states that the Government: (1) will not seek to recover from remaining railroad parties any portion of the disputed freight charges that were collected for transportation over UP; and (2) will reimburse UP in the event the Government recovers reparations from remaining railroad parties for freight charges collected for transportation over UP and these remaining railroad parties in turn recover any or all of those reparations from UP. Movants ask that UP be dismissed as a defendant and excused from further participating (except for responding to subpoenas, see infra) in these Government-initiated proceedings. Additionally, they ask that we expressly endorse the Agreement's "non-participation" clause, paragraph 14, under which we will decline to entertain cross-complaints under 49 CFR 1111.4(c) against UP in any subsequent proceedings that may be brought involving the Government's claims for reparations against connecting carriers.

The Agreement is to become effective on the effective date of our decision granting approval. Implementation is expressly contingent on the Board: (1) approving the Agreement; (2) extinguishing UP's liability and that of its present and former subsidiaries for all reparations related to the covered movements; and (3) prescribing the Agreement's rate methodology and rate update provisions as the maximum reasonable rates.

Movants point out that the Agreement is based on numerous compromises which balance the needs of the parties and resolve difficult and complex issues that have taken, and would take, years to litigate. These issues include the common carrier obligation; market dominance; rate reasonableness standards; and such costing elements as liability exposure, costs for extra and dedicated train services, and costs of safety precautions. Movants claim that the Agreement will bring certainty over a broad range of crucial operational and rate issues while providing needed flexibility (e.g., update mechanisms, renegotiation provisions, and dispute resolution procedures) over the long term to

minimize the potential for future disputes and accommodate changing needs and technologies.

In movants' view, the Agreement is in the public interest because it eliminates controversy and confrontation and promotes cooperation, which in turn will promote the safe handling and storage of the covered commodities. Movants claim that the Agreement is consistent with the rail transportation policy, which encourages reliance on competition and the demand for service to establish reasonable rates and seeks to minimize Federal regulatory authority, promote an efficient rail transportation system, and foster sound economic conditions in transportation. Movants also note that the Agreement affirms the Board's policy favoring the private settlement of disputes.

The Agreement is unopposed. CSXT and NS, the only commenters, acknowledge that the Government may settle with, and forgo reparations from, UP and waive reparations from non-settling railroad parties for through transportation over UP without jeopardizing the Government's right to proceed against non-settling railroad parties. Commenters point out, however, that they were not parties to, nor will they be beneficiaries of, the Agreement and that it does not take into consideration their unique commercial and operating circumstances. They ask us to clarify that the Agreement applies only between the Government and UP and that the Agreement's terms (e.g., those relating to common carrier obligation, rate reasonableness, and market dominance) will have no precedential value as to remaining railroad parties in any future proceedings or negotiations.

The Government opposes the commenters' request, contending that their concerns rely on hypothetical and speculative assumptions that should not stand in the way of approval of an Agreement that is otherwise in the best interests of the parties and the public. The Government agrees that the Agreement will have no direct effect on the railroad parties that are not signatories.

Our longstanding policy is to encourage the private resolution of disputes through voluntary negotiations between all interested parties wherever possible. The Agreement is the result of arm's-length negotiations over an extended period of time. Under the circumstances, we see no reason to withhold our approval. Consistent with movants' request, we will also prescribe the Agreement's rate and rate update methodologies as the maximum reasonable rate levels as between the signatories. And based on the release of the Government's claims against connecting carriers for freight charges collected for transportation on UP, we will extinguish all of UP's liability for reparations in these proceedings. Additionally, we will endorse the Agreement's non-participation clause, paragraph 14, "Reparation Claims and Rate Challenges Extinguished." Thus, we will not entertain cross-complaints under 49 CFR 1111.4(c) against UP in proceedings involving the Government's claims for reparations against connecting carriers.

We cannot agree with the Government's assertion that our approval of the Agreement and prescription of its rate and rate update methodologies will shift the burden to non-settling railroad parties to explain in future proceedings how their circumstances differ from those of UP, or why their common carrier services do not or cannot measure up to those of UP under the Agreement. Our approval of the Agreement and our prescription of its rate and rate update methodologies are based on movants' stipulation and not on a finding of reasonableness under applicable Board standards. The terms and obligations of the Agreement and the prescribed rate and rate update methodologies will be binding only as between UP and the Government and will have no precedential effect as to the reasonableness of the rates or the common carrier obligations of non-consenting railroad parties in future proceedings or negotiations.

Special Ground Rules and Abeyance.

Exception to the "Sullivan Rule." If further litigation is required with non-settling carriers, the Government acknowledges that, under Great Northern Ry. v. Sullivan, 294 U.S. 458 (1935) (Sullivan), it would normally have to show the unlawfulness of the entire through rate. The Court's ruling that "[t]he shipper's only interest is that the charge shall be reasonable as a whole," Sullivan, 294 U.S. at 463, recognized that one factor of a through rate may be unreasonably high but might be offset by a lower factor of a connecting line.

The Government, however, contends that the Sullivan rationale should not apply under the Agreement, where UP's liability is fixed and discharged. It requests an exception to the Sullivan rule. Specifically, the Government asks that it be given the option of establishing the liability of non-settling carriers for reparations by showing the unreasonableness of their divisions or proportional rates and not the unreasonableness of the entire through rate. UP did not join in the Government's request.

The Government contends that the requested exception, which is not a condition of the settlement, will result in less complexity and will promote efficient administrative handling and further settlements. The exception, according to the Government, will result in reducing the Board's administrative burdens and costs (i.e., having to assemble a complete record on the entire through rate and having to determine indirectly whether the non-settling carrier owes reparations by calculating the reasonable through rate and backing out UP's share) and lowering the parties' litigation costs by as much as one half. Additionally, the Government claims that the requested exception would encourage private dispute resolution, support the instant settlement, and encourage more settlements. Moreover, the Government claims that the exception, if granted, would spare it the inequity of having to show the unlawfulness of through rates while the railroad parties rely on antitrust reasons to deny the Government the opportunity to negotiate through rates and thereby force it to negotiate separate rate factors.

The Government's request for an exception to the Sullivan rule is premature. It is based on speculation as to the need for further litigation with remaining railroad parties. We will therefore refrain from ruling on the merits of the request at this time.

Subpoena Authority. The Government requests that we expressly reserve authority to issue subpoenas against UP in the event any of the remaining railroad parties that participated in through rates with UP fails to settle these complaints and the Government needs data or documents from UP to pursue a CMP/stand-alone cost presentation. The request is reasonable and will be granted.

Abeyance. Finally, the Government requests that we retain jurisdiction over these proceedings and continue holding them in abeyance pending settlement negotiations with the remaining railroad parties. We encourage private dispute resolution wherever possible. Therefore, we will continue holding these proceedings in abeyance and direct the Government to file quarterly reports to keep us apprised of the status of negotiations.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Agreement is approved under 49 U.S.C. 10704.
2. The rate and rate update methodologies set forth in the Agreement are prescribed as the maximum reasonable rates as between the signatories.
3. UP's liability (including that of its predecessors and subsidiaries) to the Government or connecting railroads for reparations on the shipments at issue in these proceedings is extinguished.
4. UP is dismissed as a party to these proceedings and relieved of any obligation to participate in them or in related proceedings involving claims against connecting railroads, except that UP will remain obligated to respond to the Board's subpoena authority.
5. These proceedings will continue to be held in abeyance. The Government is directed to file quarterly reports on the progress of settlement negotiations.
6. Notice will be published in the Federal Register simultaneously with the service of this decision.
7. This decision is effective on September 1, 2005.

Docket No. 38302S et al.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner
Mulvey.

Vernon A. Williams
Secretary